Jurisdictional Statement

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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81-1753

No. A634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In the Matter of the Application of

JOHN BALASH,

Appellant,

—against—

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and ABRAHAM D. BEAME, as Comptroller, City of New York, NEW YORK CITY HOUSING AUTHORITY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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March, 1982

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. A634

In the Matter of the Application of JOHN BALASH,

Appellant,

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and ABRAHAM D. BEAME, as Comptroller, City of New York, NEW YORK CITY HOUSING AUTHORITY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

QUESTION PRESENTED

1. Whether a denial of back pay is proper after petitioner had been found fit and returned to work after the Court of Appeals of New York State had determined that petitioner was wrongfully involuntarily retired without due process of law?

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JURISDICTION

This action for back pay was brought in the New York State Supreme Court, New York County, by motion for post-judgment relief after annulment of the retirement and remand to the retirement board as ordered by the New York State Court of Appeals, Matter of Balash v. New York City Employees Retirement System 34 NY 2d 654, (1974), to determine Balash's mental fitness a the time of involuntary retirement.

The Supreme Court, New York County, held that an award of back pay and pension contributions and other benefits was proper and entered judgment for petitioner. The Appellate Division, First Department reversed this decision on the ground that there had been no determination

of fitness made by respondent Board of Retirement as of 1972.

The Court of Appeals affirmed, holding that under § B3-41.0 of the New York City Administrative Code a finding as to fitness was made for the year 1974 but that petitioner, by implication, and in spite of the initial decision of the Court of Appeals was found to be properly retired in 1972.

The judgment appealed from rendered by the Court of Appeals of the State of New York was entered on October 13, 1981.

The Notice of Appeal was filed on January 7, 1982 in Supreme Court of the State of New York, New York County.

Justice Thurgood Marshall granted an extension of time within which to docket the appeal until March 12, 1982.

The Court has jurisdiction to review this decision under 28 U.S.C. § 1257(2), in that § B3-41.0 as applied is repugnant to the Fourteenth Amendment of the United States Constitution.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ B3-39.0 RETIREMENT; for Ordinary Disability. -

Medical examination of a member in city service for ordinary disability shall be made upon the application of the head of the agency in which such member is employed, or upon the application of such member or of a person acting in his behalf, stating that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, provided that such member has had ten or more years of city-service and was a member or otherwise in city-service in each of the ten years next preceding his retirement. If such medical examination shows that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, the medical board shall so report and the board shall retire such member for ordinary disability not less than thirty nor more than ninety days after the execution and filing of application therefor with the retirement system (Amended by L. 1969, ch. 866, May 22, eff. July 1.)

§ B3-41.0 SAFEGUARDS ON DISABILITY RETIREMENT -

Once each year the board may, and upon his application shall, require any disability pensioner, under the minimum age for service retirement for the group from which he was retired to undergo medical examination. Such examination shall be made at the place of residence of such beneficiary or other place mutually agreed upon. Upon the completion of such examination the medical board shall report and certify to the board whether such beneficiary is or is not totally or partially incapacitated physicially or mentally and whether he is or is not engaged in or able to engage in a gainful occupation. If the board concur in a report by the medical board that such beneficiary is able to engage in a gainful occupation, it shall certify the name of such beneficiary to the appropriate civil service commission, state or city, and such commission shall place his name as a preferred eligible on such appropriate lists of candidates as are

prepared for appointment to positions for which he is stated to be qualified, of a salary grade not exceeding that from which he was last retired. Should such beneficiary be engaged in a gainful occupation, or should he be offered city-service as a result of the placing of his name on a civil service list, such board shall reduce the amount of his disability pension and his pension-for-increased-take-home-pay, if any, to an amount which, when added to that earned by him, or earnable by him in city-service so offered him, shall not exceed the amount of the final compensation on the basis of which his pension was determined. Should the earning capacity of such beneficiary be further altered, such board may further alter his pension and his pension-for-increased-take-home-pay, if any, to an amount which shall not exceed the rate of pension and pension-for-increased-take-home-pay, if any, upon which he was originally retired but which, subject to such limitation, shall equal, when added to that earnable by him,

in city-service so offered him, shall not exceed the amount of the final compensation on the basis of which his pension was determined. Should the earning capacity of such beneficiary be further altered, such board may further alter his pension and his pension-for-increased-take-home-pay, if any, to an amount which shall not exceed the rate of pension and pension-for-increased-take-home-pay, if any, upon which he was originally retired but which, subject to such limiation, shall equal, when added to that earnable by him, the amount of his final compensation on the basis of which his pension was determined. The provisions of this section shall be executed, any provision of the charter or the code to the contrary notwithstanding. (Subdivision amended by L, 1960, ch. 509; L, 1963, ch. 100, § 38, effective January 1, 1963; L, 1969, ch. 866, May 22 eff. July 1.)

b. Should any disability pensioner, under the minimum age for service retirement for the group from which he was retired, refuse to submit to one medical examination in any year by

a physician or physicians designated by the medical board, his pension and his pension-for-increased-take-home-pay, if any, may be discontinued until his withdrawal of such refusal. Should such refusal continue for one year, all his rights in and to such pension and pension-for-increased-take-home-pay, if any, may be revoked by such board (Subdivision b as amended by L. 1960, ch. 509, April 14.)

STATEMENT OF FACTS

Appellant was retired on ordinary disability by the New York City Employees Retirement System as the request of the Housing Authority, but without his knowledge, consent and permission, effective March 1, 1972, and without an opportunity to present evidence of his fitness for duty. Prior to his retirement, plaintiff was employed as a Senior accountant, earning $12,900 per annum.

Appellant instituted an Article 78 proceeding on or about June 25, 1972, to challenge the legality of the forced retirement on the grounds that he was denied procedural due process. The proceeding was dismissed by J. Hyman Korn, Special Term, Part I, Supreme Court New York County on January 23, 1973. This decision was affirmed by the Appellate Division, First Department. The Court of Appeals granted leave to appeal. On appeal the court reversed the decision below and remitted the case to Special Term with directions to remand to the Board of Trustees of the Retirement

System for a redetermination, after adequate notice to petitioner, of the charges and the evidence against him and after affording him an opportunity to submit contrary evidence. Balash v. New York City Employees Retirement Sytem, 34 NY 2d 654 (1974).

Justice Greenfield then ordered that the determination made by respondents in 1972 upon which the Board of Trustees of the Retirment System based the decision to retire appellant, be vacated, annulled, rescinded and set aside and that a redetermination be made conforming with the Court of Appeals decision.

On June 18, 1974 the Board of Trustees of the Retirement System requested that petitioner submit any contrary evidence on the issue of his mental state.

The reports available to the Medical Board, and upon which the Board based its determination, were reports written in 1964, 1969 and 1972, all unfavorable to appellant. Appellant submitted a report from a Dr. John J. Vetter,

who examined him shortly after the forced retirement and concluded that appellant was not mentally unfit. The Medical Board requested an updated report and a subsequent examination by Dr. Vetter resulted in his reaffirming the conclusions found in the 1972 report. There was no 1974 evaluation made of appellant's mental state by any physician on behalf of the Medical Board of the Retirement System.

The Medical Board found appellant to be mentally and physicially fit based on these reports. The recommendation was made that appellant's name be restored to a Civil Service Preferred List.

The Medical Board then forwarded its recommendation to the Board of Trustees of the Retirement System. On January 10, 1975, the Board of Trustees concurred with the Medical Board's findings and restored Balash to the preferred eligible list pursuant to Section B 3-41.0 of the Administrative Code. This section permits the placement of the name of one who has petitioned to rescind his retirement, or has been re-

called by the Board of Trustees and been proven fit to work, to be placed on a preferred list.

There is no other section in the Administrative Code that deals with restoring a retiree to service.

In May of 1976 appellant had not been returned to work and he returned to the Supreme Court to seek reinstatement and back pay as post-judgment relief. Upon bringing of this motion he was immediately offered a position as Senior Accountant.

In May of 1978 Justice Irving Kirschenbaum held a hearing to determine how the back salary due would be computed and which benefits wuld be considered salary and referred the matter to a referee. No challenge was made to this referee's report on the ground that appellant was not entitled to back salary because of the language of the Board of Trustees's recommendations.

In February of 1978 a motion was made to affirm the referee's report but asked that if sick days and annual leave were not restored to petitioner that he not return the funds set aside

for this purpose.

Respondent made a cross motion asking that the recommendation that pension contributions to be made by the city be rejected. It did not ask to have the salary award set aside on equitable grounds or on statutory grounds.

Justice Irving Kirschenbaum, on June 11, 1979, granted appellant's request to modify the sick day and annual leave day findings and affirmed the referee's report in all other respects and found that petitioner was to have judgment for $41,718.32 plus interest, as per stipulation, and the other relief recommended by the referee. Respondent appealed Justice Kirschenbaum's judgment which granted the back pay, pension contribution, and restoration of annual leave and sick days, and the order of Justice Riccobono which found liability for salary and benefits.

The Appellate Division, First Department reversed the decision of Justice Kirschenbaum on the facts and the law, holding that no determination

had been made as to appellant's mental state in 1972.

The Court of Appeals of the State of New York affirmed the decision of the Appellate Division, First Department, on other grounds. It held that the determination of fitness made in 1974, implied that appellant was unfit in 1972.

In the Court of Appeals, appellant argued that the United States Constitution required an award of back pay, after a new hearing and reinstatement, if the first determination was based upon a hearing that violated appellant's right to procedural due process.

Appellant argued that the Court of Appeals at the time of its first decision in 1974 could not order reinstatement and back pay because of the necessity of a new finding on the issue of mental fitness. However, once this second finding of fitness was made, then the relief of back pay was mandatory under the Fourteenth Amendment.

Appellant cited Monell v. Dept. of Social Services, 436 U.S. 658,

98 S.Ct. 2018, 56 L. Ed. 2d 611 (1978); Newman v. Board ofEducation, 594 F2d 300 (2nd Cir. 1979); Keyer v. Civil Service Commission of the City of New York, 397 F.Supp. 1362 (E.D.N.Y. 1975) and Vega v. Civil Service Commission of the City of New York, 385 F.Supp. 1376 (S.D. N.Y. 1974) in support of his argument.

The Court of Appeals did not pass on this argument in its decision.

The Question is Substantial

Whether it is proper to deprive a litigant of relief if suit is brought in State Court for a violation of procedural due process in the area of administrative law when relief is consistently granted in the Federal Court is a very substantial question of law.

There should be no difference in the relief available where a proceeding is brought under Article 78 of the New York's Civil Practice Laws and Rules rather than under 42 U.S.C. § 1983 if it is found that a violation of procedural due process has occurred.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction.

Respectfully submitted,

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March 12, 1982

Appendix

APPENDIX A

DECISION OF THE STATE OF NEW YORK COURT OF APPEALS

No. 400

In the Matter of John Balash,

Appellant,

v.

New York City Employees' Retirement System, et al.,

Respondents.

(400) Joan Goldberg, NY City, for appellant.
Allen G. Schwartz, NYC Corporation Counsel (Larry A. Sonnenshein & Francis F. Caputo of counsel) for respondent.

MEMORANDUM

The order of the Appellate Division should be affirmed, with costs.

Petitioner was retired, pursuant to Section B3-39.0 of the Administrative Code of the City of New York, for disability from a position as senior accountant with the New York City Housing Authority. We held (34 NY2d 654) that petitioner had been denied due process

because he had not been advised of the medical reports offered against him or afforded the opportunity to controvert them with evidence of his own, and directed that the matter be remanded to the Board of Trustees of the Retirement System for redetermination after notice and an opportunity to be heard.

The judgment entered June 11, 1974 by Special Term made our order the judgment of that court, vacated the Board's prior determination under Section B3-39.0 and ordered the Board to make a new determination. The medical Board of the Retirement System, after receiving the reports presented against petitioner in 1972 and reports made in 1972 and 1974 by petitioner's doctor, reported to the Board of Trustees on November 14, 1974 that he was "not now" unfit and recommended that petitioner's "name be restored

to a Civil Service Preferred List". On the basis of that report the Board of Trustees on January 10, 1975 adopted a resolution which recited that it was acting "pursuant to the provisions of Section B3-41.0 of the Administrative Code" and certified petitioner, "until March 1, 1972, a Senior Accountant, New York Housing Authority, for registry as a preferred eligible * * * for appointment * * * at the salary grade not exceeding that from which he was last retired." Petitioner was ultimately reemployed after intervening events not germane to the present issue, though by the Transportation Administration, an agency different from that from which he had been retired in 1972.

The original petition had asked reinstatement and back pay. After his reemployment petitioner moved in the original proceeding for determination

of back pay to which he was entitled. Special Term held him to be entitled to $47,976.07 in back pay as well as to vacation and pension adjustments. On appeal the Appellate Division reversed, concluding that no determination had ever been made concerning petitioner's capacity in 1972 and that petitioner's failure to require by mandamus that a 1972 determination be made was not the equivalent of a holding that the original determination was without basis in fact. While we agree with the result reached by the Appellate Division, we arrive at our conclusion by different reasoning.

The necessary implication of the 1975 resolution is that the Board of Trustees concluded that petitioner was properly retired pursuant to Section B3-39.0 in 1972, for the provision under which it purported to act (B3-41.0) deals

with periodic medical examination of "any disability pensioner" who is "under the minimum age for service retirement from the group from which he was retired," and directs the Board of Trustees if it agrees with the Medical Board that he "is able to engage in a gainful occupation" to certify his name "as a preferred eligible * * * for appointment to * * * a salary grade not exceeding that from which he was last retired" (emphasis supplied). That redetermination was made only after petitioner was advised that the Housing Authority had applied for his retirement under Section B3-39.0 on the basis of the medical reports originally submitted in 1972, had himself submitted reports dated September 18, 1972 and October 20, 1974 from his doctor and had stipulated that those reports constituted all the additional evidence

he wished to submit. Petitioner could have sought judicial reivew of the 1975 redetermination on the ground that it did not conform to the mandate of the judgment on remand. Instead he accepted employment with a different agency pursuant to the redetermination. He could not thereafter, without setting that redetermination aside, seek back pay for the period between the time he "was last retired" by the Housing Authority and the time of his employment by the Tranportation Administration.*

---

* The dissent necessitates the following observations: (1) the 1972 determination was set aside on procedural grounds only, (2) the reports before the Board in 1972 were considered by it in 1975 and petitioner was told in advance that they would be, (3) it is simply a non-sequitur to conclude that because the Board accepted Dr. Vetter's 1974 report which was not expressly controverted by opposing evidence it necessarily accepted his 1972 report which was contradicted by the reports of three doctors, (4) the

1975 determination in speaking of petitioner as "until March 1, 1972, a Senior Accountant, New York City Housing Authority" and the position "from which he was last retired" necessarily assumes that he was properly retired from that position, a conclusion for which there was substantial evidence before the Board, and (5) petitioner's acceptance of, by failing to contest, that determination is wholly inconsistent with his claim for back pay.

Matter of Balash v. NYC Employees' Retirement System
Case No. 400

FUCHSBERG, J. (dissenting):

Unless "down" is "up" and "up" is "down", Ido not see how a determination adverse to the aggrieved civil service employee who is the petitioner in this proceeding can be justified in logic or law. Accordingly, I must vote to reverse and reinstate the judgment at Special Term.

This saga starts with petitioner's involuntary retirement for alleged emotional disability in March 1972 following a fatally flawed bureaucratic determination, which this Court found it necessary to wipe out (34 NY2d 654). Specifically, when the case finally wended its way here in 1974, we held, mincing no words, that the Retirement System had denied the petitioner elemen-

tary due process. It gave no proper notice. It kept the medical reports, on which it later claimed it had acted, from petitioner. It provided him with no opportunity to controvert them.

The result of our decision, as later formally incorporated in a judgment entered by Supreme Court Justice Edward J. Greenfield at Special Term, New York County, was to "vacate", "annul", "rescind" and "set aside" the System's determination. The System's decision was thus deemed dead; for practical as well as legal purposes, it was as if it has never been. On that assumption, the judgment ordered the System to make an entirely new determination. That there be no delay, it required that this be done within ninety days.

After all, the victim of its administrative misconduct undeservedly was suffering a large and continuing loss of wages and was being forced to undergo the rigors and expense of carrying on a trying litigation to vindicate his rights. But the System took its time, indeed twice the allotted time.

More important, this was not the System's only evidence of recalcitrance. It is not now disputed that the intent of the Court was that the System's redetermination be one as of 1972, when the petitioner had been so unlawfully separated from his position. Yet, the respondent made no new determination as of 1972. Rather, for reasons it was never to explain, it unresponsively chose to limit its remedial action to a declaration that, as of January 10, 1975, petitioner was

not unfit for service. The net result was that no determination of fitness as of 1972 survived. And none other than the one of normalcy in 1975 was ever made. Seemingly, then, the employee's entitlement to the wages of which he was deprived during the period between the unwarranted retirment and the tardy restoral would seem to follow as does the day and night.

To suggest that the petitioner did not move to enforce the consequence of the legal and factual circumstances with which he was thus favored does not abide analysis. He took affirmative steps to follow up on the vacating of his undeserved retirement. Absent redetermination by respondent, petitioner pressed for the monetary damages he had suffered from the erroneous ruling that

now was no more. Not surprisingly, nisi prius gave full support to the steps he took. Acting on a contested application in the original proceeding, our State Supreme Court, this time in the person of Mr. Justice Xavier C. Riccobono, in June 1976, set the matter down for assessment of the wages lost. Since, as described in the Justice's implementing order, the "re-examined petitioner" had been found "not mentally incapacitated," the court ruled that to deprive the petitioner of his lost income during his"wrongful discharge * * * would frustrate and fail to serve the interests of justice". One therefore cannot brook belief that, having obtained obliteration of the adverse administrative ruling, so that it no longer was outstanding, petitioner, and not the obdurate respondent, should now be faulted

for not having pressed for a form of relief premised on an existent, rather than vanished, determination of capacity.

As it was, before the hearings petitioner so initiated were concluded, and before it had been determined that he had fully met any burden to mitigate his losses during the period of imposed disability, another three years were to elapse. At long last, in 1979, an award for $47,976.07, less sums the petitioner "would have contributed if he had not been wrongfully retired," was forthcoming, this time from Supreme Court Justice Irving Kirschenbaum. Since then, more time has gone by while the appellate process initiated by the System progressed. Notably, in all these years the System took no further steps to define petitioner's mental health as less than normal, neither as

of 1972, nor as of 1975, nor, for that matter, for and as of any of the years of his resumed employment right up to and including 1981. It follows that, as the records stands, it is a long fixed fact that there was never any cognizable basis for his compelled retirement.[1]

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1 Whatever administrative convenience, if any, may have been served by the classification of its 1975 redetermination as one made pursuant to Section B3-41.0, it is inescapable that this was not a "periodic medical examination" of the sort which the majority says that ordinace contemplates. Nor, as indicated, did it ever purport to describe petitioner's condition in 1972. In short, it provides no basis for any "implications", "necessary" or otherwise, concerning the petitioner as of 1972. Simply put, no basis for the 1972 retirement subsists.

Consequently, it seems difficult to say and the Appellate Division did not, that a "necessary implication" of the System's 1975 resolution, though it expressly spoke contemporaneously of that year alone, "concluded that petitioner was properly retired" almost three years earlier, i.e., in 1972. Beyond this, such assertion is even less supportable when one considers that the clean bill of health the System gave the petitioner in 1975 was founded on the System's crediting of the medical report of a particular psychiatrist, Dr. John J. Vetter, who, far from agreeing with the diagnostic label of "paranoid personality" on which the System originally had premised its vacated and unsubstituted ruling, not only found no basis for such a diagnosis, but, instead, made clear that petitioner's

emotional health was "entirely within normal limits." More significantly if possible, Dr. Vetter hae come to essentially the same conclusion back in 1972. In restoring the petitioner, the System could hardly have relied primarily on Dr. Vetter's emphatic findings to commant its restoral of the petitioner had it not then also accepted the negative opinion in which he had certified that the self-same employee manifested an equal absence of any disabling condition in 1972. To suggest that the System, at the same time that it adopted the Vetter view, intended to still adhere to its overruled 1972 stance, as I see it, makes little sense. To assert that there is such a "necessary implication" makes even less. If anything, the only permissible "implication" would have to be to the contrary.

Put another way, in light of the irreconcilability of the Vetter reports with the judicially repudiated initial (1972) administrative holding that the petitioner suffered from the insidious, chronic and well-nigh irradicable mental condition known as paranoia, to draw the unfounded interence is to put a premium on the System's failure to carry out our clear dictate that, if the vacated determination was to be replaced, the System make a redetermination as of 1972. As every judicial body save the present majority of this Court agreed, this the System never did.

The judgment for the petitioner, therefore should be reinstated.[2]

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[2] My response to the footnote in which the majority replies to this writing

may be handled ad seriatim: (1) Its ameliorative suggestion that the 1972 determination was set aside "on procedural grounds only" reflects nothing less than the constitutionally protected right to procedural due process. (2) The strained conclusion that the System's 1975 determination was one newly determining petitioner's 1972 state of health is based on no more than the pro forma recital "after reviewing your entire case" in the System's one sentence 1975 decision. The only physician it referred to by name was Dr. Vetter; the year 1972 was never mentioned. (3) Though the other facts in this case give strong indication that the System agreed with Dr. Vetter's 1972 report, Ihave never suggested that this is "necessarily" so. Rather, my point is that, under the circumstances already detailed, the majority's resort to the phrase "necessary implication" in describing its speculation as to what the System in 1975 intended as of 1972 runs counter to everything the record reveals. (4) The System's 1975 determination, by referring to the historical fact that the petitioner was a senior accountant when he was wrongfully retired in 1972, cannot be stretched to imply that a new 1972 determination was intended. (5) Its final item is but a rehash of the unrealistic argument that the petitioner should have contested the 1975 determination, though, so far as one could tell, it found him in good health, did not presume to make a new 1972 determination and did not try to disturb the vacatur of the old one.

* * * * * * * * * * * * * * * * * * *

Order affirmed, with costs, in a memorandum, All concur except Fuchsberg, J., who dissents and votes to reverse in an opinion.

Decided October 13, 1981

APPENDIX B

34 N.Y. 2d 654.

In the Matter of John BALASH, Appellant v. NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM et al., Respondents. Court ofAppeals of New York. March 29, 1974

MEMORANDUM

The proceedures by which petitioner was "certified" a "paranoid" personality and involutarily retired from his position whth the New York City Housing Authority with ordinary disability benefits did not meet the minimum requirements of due process. The only written notice given petitioner was a letter of February 3, 1972, from the respondent Retirement System stating that his employer had applied for his retirement "on account of Ordinary Disability" and requesting his attendance at an "interview"

on February 10, 1972, before the medical panel. He was given no written notice of any reason for the proposed retirement or of any opportunity to present medical or other relevant evidence in his favor to either the medical panel or the Board of Trustees of the respondent Retirement System. During the proceedings, petitioner neither received nor was shown a copy of any of the medical reports or other material which formed the basis of the medical panel's certification that he was "paranoid". After petitioner was retired, he was given no written statement of the reasons for the action. Petitioner should have been advised of the charges against him and the evidence on which they were based, afforded meaningful opportunity to present documentary

or other evidence in his favor at least to the Board of Trustees, and advised of the reasons for their determination (Matter of Meschino v. Lowery, 31 N.Y. 2d 772,774, 338 N.Y.S. 2d 625, 290 N.E. 2d 825). Due process does not require that petitioner has been afforded a full-blown adversary hearing with the right to cross-examine the psychiatrists whose reports formed the basis of the medical panel's certification and the board's subsequent determination. He had, however, the right to be informed of the substance of those reports and should have been given an opportunity, at least before the Board of Trustees, to controvert the conclusions they contained (Matter of Newbrand v. City of Yonkers, 285 N.Y. 164, 179,

33 N.E. 2d 75).

Accordingly, the order appealed from should be reversed and the matter remitted to Special Term with directions to remand to the Board of the Retirement System for redetermination after adequate notice to petitioner of the charges and evidence against him and after affording him an opportunity to submit contrary evidence. BREITEL, C.J., and JASEN, GABRIELLI, JANES, WACHTLER, SAMUEL RABIN and STEVENS, JJ., concur.

Order, 41 A.D. 2d 1026, 344 N.Y.S. 2d 320, reversed, with costs, and the matter remitted to Special Term for further proceedings in accordance with the memorandum herein.

APPENDIX C

COURT OF APPEALS OF THE STAE OF NEW YORK

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In the Matter of the Application of JOHN BALASH,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78, C.P.L.R., -against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and ABRAHAM D. BEAME, as Comptroller, City of New York, NEW YORK CITY HOUSING AUTHORITY,

Respondents-Respondents.

----------x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John Balash, the appellant above-named, hereby appeals to the Supreme Court of the United States form the final judgment of the Court of Appeals, State of New York, affirming the

Order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered in this proceeding on October 13, 1981.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Dated: January 7, 1982

s/

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Motion to Dismiss or Affirm

Supreme Court, U.S.
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CLERK

81-1753

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

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April, 1982

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In the Matter of the Application of

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Appellant,

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and ABRAHAM D. BEAME, as Comptroller, City of New York, NEW YORK CITY HOUSING AUTHORITY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

MAY IT PLEASE THE COURT:

Object

The object of this motion is to dismiss appellant's appeal to this Court as not being within the jurisdiction of the United States

Supreme Court since the appeal is not taken in conformity to 28 U.S.C. 1257(2). The appeal does not present a substantial federal question. The federal questions sought to be reviewed, though appellee continues to assert the nonexistence of any substantial federal question, were neither properly raised, nor expressly passed on. The order of the New York Court of Appeals rests on adequate non-federal grounds. The grounds for appeal are fictitious and frivolous. The appeal in effect requests a review by the United States Supreme Court of the meaning and import of an administrative determination, a factual adjudication which has already been made by the New York State courts. Finally, there being no good reason in law or facts of this appeal, allowance of appellant jurisdiction in this case would waste time, effort and expense and unduly burden an

already overcrowded docket.

Why the Appeal Should be Dismissed

The appeal is not within the jurisdiction of this court because it is not taken in conformity with 28 U.S.C. 1257(2) which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution treaties or laws of the United States, and the decision is in favor of its validity."
>
> * * *

Appellant expressly relies on this statute as the sole jurisdicitonal predicate for this appeal (See Appellant's Jurisdictional Statement, pp. 3-5). The

only statutes mentioned in the text of the state Court of Appeals affirming and dissenting opinions are §B3-41.0 of the New York City Administrative Code (quoted in Appellant's Jurisdictional Statement, p. 8) and §B3-39.0 of the New York City Administrative Code (quoted in Appellant's Jurisdictional Statement, p. 7).

Nowhere was the validity of these statutes or any other statutes mentioned in any of state court opinions drawn in question as being repugnant to the Constitution, treaties or laws of the United States. Consequently, nowhere in the state court's opinions were any of these statutes held to be valid in the face of arguments that they were repugnant to the federal Constitution, treaties or laws.

Furthermore, a review of the full record clearly reveals that appellant never

raised the issue of the validity of the aforementioned statutes nor was this issue ever passed on.

It is also apparent from the state court's majority opinion that its order rests on an adequate non-federal basis.

Appellant's claim is for compensatory damages, back pay and other employment benefits for the period of time that he was granted ordinary disability retirement over his objection. Appellees' initial administrative determination in 1972 to retire petitioner had previously been annulled by the state Court of Appeals on procedural due process grounds and the matter remanded to appellees for a redetermination. The Court now held that the appellees' redetermination (this time conducted in conformity with federal due process standards) had, in part, reaffirmed its prior determination

that petitioner was disabled from performing his duties in 1972. The Court further noted that the administrative redetermination was never challenged by appellant. Thus, the Court concluded that petitioner did not possess a valid claim for compensatory damages, a conclusion consistent with the principles enunciated by this Court in Carey v. Piphus, 435 U.S. 247 (1978), that a deprivation of procedural due process does not entitle the aggrieved person to recover damages when the administrative determination was justified and the same result would have been reached had a proper proceeding been conducted. The Court's ruling was not based on the constitutionality of any statute or law, but simply on the meaning and import of an administrative determination. And a ruling of this nature is not subject to this Court's review.

In reading the state court's opinion and then Appellant's Jurisdictional Statement, it becomes clear that the reasons for appeal are fictitious and frivolous and that appellant is merely inviting this Court to second-guess the New York Court of Appeals on the merits of this case.

For all the above reasons, the appeal in this case should be dismissed.

Conclusion

Appellant has sought to bring an unwarranted appeal, and the appeal should be dismissed for lack of jurisdictional requirements, with all costs being assessed against appellant.

IT IS SO MOVED,

Respectfully Submitted,

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